NO. 84369-4

**SUPREME COURT THE STATE OF WASHINGTON**

JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,
Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, et al., (No. 82399-5)

**and**

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE PARKS AND RECREATION COMMISION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)
Respondents.

**Consolidated on Appeal**

# SUPPLEMENTAL BRIEF OF APPELLANTS FEIL, TONTZ and RIGHT TO FARM ASSOC. OF BAKER FLATS [RAP 13.7(d)]

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ORIGINAL

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Washington Constitution**



**Washington Administrative Code**



**Douglas Co. Code / comprehensive plans**



**Federal Law**

## I. INTRODUCTION

Throughout the proceedings below the Appellants ("the Farmers" hereafter) have consistently and continuously argued that the outcome of every issue in this case depends upon one prominent fact: that Douglas County changed its RCW 36.70A.060 development regulations to override — and thereby eliminate — the agricultural protections it was required to provide. The local decision changed the permitted use of the land from agricultural to recreational within a GMA-designated AGRICULTURAL RESOURCE AREA OF LONG TERM COMMERCIAL SIGNIFICANCE as defined in RCW 36.70A.030(2) and (10), and as designated by Douglas County pursuant to RCW 36.70A.170. Appellants' farms were previously protected by Douglas County Development Regulations adopted pursuant to the limited authority granted by the legislature under RCW 36.70A.060 and RCW 36.70A.177.

All of the decision-makers below ignored the significance of this inconvenient fact, analyzing and deciding the issues as if the case involved some routine rezone of land not protected by state law.

The Farmers understand that this Court will rely upon the Opening, Responding, and Reply Briefs considered by Division III Court of Appeals. However since that briefing by the parties herein, the Court of Appeals shaped its own unique analysis, which this Supplemental Brief will primarily focus on.

Appellants' Supplemental Brief places heavy emphasis on the question of whether or not the County action to create its Recreational

Overlay ["R-O"] Use District constituted a "rezone," because that question is central to a correct disposition of all of the issues in this case. It cannot be inconsistently resolved. The Court will see that though both the trial court and the Eastern Washington Growth Management Hearings Board ["EWGMHB"] found that a "site-specific rezone" had occurred. On appeal to Division III Court of Appeals, both the State and County Respondents argued this question inconsistently — sometimes arguing that a "site-specific rezone had occurred," and other times arguing that "no rezone occurred" at all. The Respondents continue their contradictory arguments in submittals made to this Court in this review. Inconsistent treatment of that issue infected the decision of the Court of Appeals below in *Feil v. Eastern Washington Growth Mgmt. Hearings Board, et al*, 153 Wn. App. 394 (2009) [copy attached hereto at Appendix ("A")].

## II. ASSIGNMENTS OF ERROR

Farmers' Opening Brief [at pages 4-5] stated four (4) Assignments of Error, which Farmers incorporate by this reference and continue to assert, together with an additional error believed to have been made by the Court of Appeals in its award of attorney fees. Farmers, in their Petition For Review to this Court [at pages 2-3] condensed their "Issues" down to six (6) stated issues, as follows:

**ISSUE NO. 1: Did the EWGMHB have RCW 36.70A.280-290 jurisdiction to review Douglas County's creation of a Recreational Overlay ("R-O") zoning district necessary to develop an active recreation project within the County's previously-designated Baker Flats Agricultural Resource Area of Long Term Commercial**

**Significance?** (The answer to this issue/question is YES.)

**1.1** Did the zoning change constitute the amendment of a development regulation as defined in RCW 36.70A.030(7)? (The answer to this issue/question is YES.)

**1.2** Did the zoning change constitute (1) a site-specific rezone that was (2) authorized in the comprehensive plan, such that it constituted a "project permit" as defined in RCW 36.70B.020(4)? (The answer to this issue/question is NO.)

**1.3** Where the County's Comprehensive Plan identifies permissible zoning districts, but does not even mention a Recreational Overlay ["R-O"] zoning district, can the comprehensive plan be construed to have "authorized" establishment of a Recreational Overlay zoning district? (The answer to this issue/question is NO.)

**1.4** Does the GMA — at RCW 36.70A.177 — impress broad public interest upon the entirety of a designated Agricultural Resource Area of Long Term Commercial Significance such that rezones of protected agricultural land made in order to allow non-agricultural uses cannot be deemed "site-specific?" (The answer to this issue/question is YES.)

**1.5** If a comprehensive plan does not mention "Recreational Overlay Zones," is the time for taking an appeal to the Growth Management Hearings Board triggered by earlier adoption of the comprehensive plan or by the later amendment of development regulations to actually authorize such a rezone? (The answer to this issue/question is LATER.)

**ISSUE NO. 2: Regardless of *when* Douglas County first authorized a rezone of land to Recreational Overlay within the Agricultural Resource Area of Long Term Commercial Significance, did RCW 36.70A.177 limit the County's zoning authority which the County exceeded?** (The answer to this issue/question is YES.)

ISSUE NO. 3: **When a county adopts and implements a comprehensive plan and development regulations that directly conflict with express requirements of a general law of the State of Washington, is the local law void for violating Washington Constitution Article Eleven § 11, whether or not an administrative GMA compliance hearing is available?** (The answer to this question is YES.)

ISSUE NO. 4: **Did Douglas County fail to study, develop and describe alternatives as required by RCW 43.21C.030(2)(e) where resource conflicts were unresolved?** (The answer to this question is YES.)

ISSUE NO. 5: **If the underlying zoning decision is void or reversed, must development permits also be reversed?** (The answer to this issue/question is YES.)

ISSUE NO. 6: **Where the County's actions on its trail project resulted in three separate judicial appeals, two of which the Farmers prevailed in and Respondents failed to appeal, was it reversible error for Division III COA to hold that the Respondents had prevailed in "all prior judicial proceedings" required for awarding RCW 4.84.370 attorney fees?** (The answer to this issue/question is YES.)

## III. STATEMENT OF THE CASE

Farmers rely upon the statement of the case contained in their Opening Appeal Brief, and summarize here only those portions that are especially important to the resolution of the issues by this Court. There is no dispute that the northerly four (4) miles of the proposed five-mile long recreational trail traverses the Baker Flats Agricultural Area of Long Term Commercial Significance. The dispute relates to the significance of that undisputed fact.

The Respondents' basic planning assumptions from the outset admitted that the application required a rezone of the trail corridor to

"Recreational Overlay," a planning process that began in 1998 when a "pre-application" meeting was held. [82400-2, Vol. 4 page 507] The thirteen-year duration and multiple mid-process shifts presents a classic violation of the prohibition of RCW 36.70A.470:

> "RCW 36.70A.470. Project review—Amendment suggestion procedure-Definitions
> (1) Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW shall be used to make individual project decisions, not land use planning decisions. If, during project review, a county or city planning under RCW 36.70A.040 identifies deficiencies in plans or regulations:
> (a) The permitting process shall not be used as a comprehensive planning process;
> (b) Project review shall continue; and
> (c) The identified deficiencies shall be docketed for possible future plan or development regulations amendments."

The reason why RCW 36.70B.020(4) includes a requirement that a site-specific rezone actually have been considered and authorized in the comprehensive plan is to assure that, at some point prior to implementation, the policy choices have been properly addressed and made. In this case, the Comprehensive Plan did not address Recreational Overlay zones. The County did specifically designate the Agricultural Resource Area, setting forth policies to protect it, and implementing those policies through agricultural zoning as is authorized by RCW 36.70A.177. The decisions below bring Douglas County into conflict with RCW 36.70A.470.

**A. <u>Applicants And County Acknowledge That Approving A Recreational Overlay Use Zone Constitutes A Rezone</u>:**

1. **<u>SEPA</u>**: The government applicants completed their own State Environmental Policy Act ["SEPA"] review for their trail project, merely

adopting the federal Environmental Assessment ["EA"] conducted by federal officials pursuant to National Environmental Protection Act ["NEPA"]. (Opening Brief, page 8) That April 21, 2001 EA [ 824200-2 Vol. 4 CP page 448] described the trail as a "public recreation trail" [82400-2, Vol. 4 page 450] requiring a rezone from "agricultural" to "Recreational Overlay." [82400-2, Vol. 4 page 456] That EA reiterated the need to "rezone" land for the trail corridor to "R-O." [82400-2, Vol. 4 page 458] It explained that the rezone to "R-O" was necessary to ensure "consistency" with Douglas County's comprehensive plans, but it located "R-O" rezone authority in the Douglas County zoning code, not in the Douglas County Comprehensive Plan. [82400-2, Vol. 4 pages 465-466) That study also acknowledged that the proposed trail — if developed — would require the removal of twenty-four (24) acres of mature and growing orchard trees. [82400-2, Vol. 4 page 464]

2. **CONSISTENCY ANALYSIS**: The Applicant / trail proponent produced an October 2001 "Consistency Analysis." [82400-2, Vol. 5 CP page 649] That analysis noted the existence of the Agricultural Resource Area of Long Term Commercial Significance and it noted that the project would convert forty-four (44) acres of "prime and unique" soils to recreational use. [82400-2, Vol. 5 page 657] That Analysis notes that the same goals for Resource Areas exist in all applicable Douglas County plans. [82400-2, Vol. 5 page 660] Nowhere in that analysis does the applicant State Parks & Recreation Commission ["Parks"] suggest that the Comprehensive Plan "authorizes" a Recreational Overlay rezone.

### 3. THE COUNTY AGREES THAT "R-O" DESIGNATION IS A REZONE:

In its February 22, 2002 "Notice of Incomplete Application" [82400-2, page 218], a copy of which is attached hereto at Appendix ("B"), Douglas County (in paragraph 7) informed Applicant Parks of a $500.00 charge for the "Recreational Overlay District Zoning Change."

In a July 23, 2003 letter [copy attached at Appendix ("C")], the County reiterated its position that a Recreational Overlay approval constituted a rezone.

> "...At that meeting I [Prosecuting Attorney Steve Clem] merely suggested that the Rocky Reach Trail project be pursued by the proponent as a multi-modal transportation component of US 2/97, rather than an unrelated recreational use. I opined that the development of the right-of-way for transportation purposes would **eliminate the need for a zoning change involving a recreational overlay.** My suggested approach was adopted." [82400-2, Vol. 3 CP page 215] (emphasis added)

## B. The State and the County Changed "Rezone" Tactics:

In the first judicial appeal of this project, the Douglas County Superior Court disposed of the July 23, 2003 Douglas County avoidance contrivance. [82400-2, Vol. 33 CP pages 6383-6386] After the remand from that loss in superior sourt, the State and Douglas County created a "Recreational Overlay Use District." However, they then adopted a mixed semantic avoidance approach, sometimes arguing that approval of a recreational overlay did not constitute a "rezone" because the "underlying zone" (agricultural) was "not changed" [State Brief at page 11, County Responding Brief at page 16] and sometimes admitting that the R-O decision was a "rezone," but claimed it was a time-barred "site-specific

rezone." [see County's Responding Brief at page 15, State's Responding Brief at page 10]

**C. Both The Superior Court And The EWGMHB Recognized That A Rezone Had Occurred:**

The EWGMHB's decision is attached to the Petition for Review of that Decision [82399-5, Vol. I, page 2-36] and is also attached at Appendix ("C") to Farmers' Opening Appeal Brief. At page 15 of its decision, the EWGMHB stated:

> "The parties in this case disagree whether the R/O permit is a site-specific rezone, as alleged by the County and State, or an amendment to the County's development regulations, as alleged by Petitioners." (emphasis added)

At page 16-17 of the decision, the EWGMHB stated:

> "The Court in *King County* [*King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000)] decided this case based on development regulations adopted pursuant to RCW 36.70A.177, specifically "innovative techniques", not on whether a site-specific rezone, such as an recreational overlay zone, is allowed in designated agricultural lands of long-term commercial significance." (emphasis added)

For its part, the Douglas County Superior Court squarely based its own decision on the fact that creation of a "Recreation Overlay" zoning district constituted a rezone:

> ". . . and the Supreme Court in *Woods* [*Woods v. Kittitas County*, 162 Wn.2d 579, 174 P.3d 25(2007)] said that a project permit is, essentially, a site-specific rezone, . . . As a site-specific rezone, this Court, then, believes that the rezone by the Commission is controlled by the comprehensive plan." [82400-2, Vol. 43, pages 8330-8339]

There is no legitimate question that the State applicants and the County argued to both the EWGMHB and to the superior court, that

creation of a Recreational Overlay zoning district constituted a "rezone." Though both tribunals incorrectly analyzed the significance of that fact, nobody can legitimately argue — as both the County and State Respondents now sometimes do — that a "rezone" did not occur.

**D. The Court of Appeals Incorrectly Adopted Semantic Contradictions:**

These semantic inconsistencies found their way into the Court of Appeals Decision below [a copy of that decision is attached hereto at Appendix ("A")]. At page 10 of that decision, the court decided that a "recreational overlay district is not a zoning amendment." But, at page 12 of its decision, the Court of Appeals stated:

> "The Hearings Board simply 'does not have jurisdiction to hear a petition alleging that a site-specific rezone violates the GMA.' *Woods*, 162 Wn.2d at 612. And that is what we are dealing with here." *Feil*, supra. (emphasis added)

**E. Other Semantic Issues Clouding The Decisions Below:**

In their appellate briefs, Respondents Douglas County and the State have taken to referring to a supposed "Recreational Overlay Permit." This terminology is pure invention and has no basis in the Douglas County Code. Nowhere does the Douglas County Code mention such a "permit." Uniformly, the Douglas County Code refers to a "Recreational Overlay District" [see copy of DCC Chapter 18.46.010-040, R-O Recreational Overlay District (82400, CP 2388 & 2389) attached hereto at Appendix ("H")]. The Respondents apparently hope that by misapplying nonexistent terminology they can somehow finesse the primary issue in this case, which is whether or not this decision *is* a

"permit" or an amendment to a "development regulation." The record demonstrates that Applicant State Parks' recreational trail project required an amendment to Douglas County's zoning development regulations and was never just a simple "land use permit application."

Other unfortunate semantic technique utilized by these Respondents was to refer to the recreational trail as a "transportation facility" on "public land." The trial court ruled it a recreational trail. In *King County v. Central Puget Sound Growth Management Hearings Board* ["*Soccer Fields*"], supra, the argument was made that since the land for the soccer fields was public, that should make a difference in the outcome. That public land argument was soundly rejected by this Court. If the question of public ownership is relevant at all, in this case it involves the fact that the Government Respondents *need a rezone* because Respondent Washington Department of Transportation ["WSDOT"] cannot lease the land to State Parks for recreation purposes without first complying with the zoning criteria set out in RCW 47.12.120, which requires that the use comply with zoning regulations of local governments.

## IV. ARGUMENT

**ISSUE NO. 1: The EWGMHB Had Appellate Jurisdiction.**

Growth management hearings boards have jurisdiction to review adoption and amendment of local development regulations for compliance with the GMA. RCW 36.70A.280(1)(a). The decisions below affected land previously designated by Douglas County as Agricultural Resource Lands of Long Term Commercial Significance ["Agricultural

Resource Area" hereafter] pursuant to RCW 36.70A.170(1).

**A. The Decision Amended Development Regulations:**

The GMA requires that a designated Agricultural Resource Area be protected, and that the protections be in the form of adopted development regulations. RCW 36.70A.060 (1); RCW 36.70A.040. The GMA provides that the development regulations to protect RCW 36.70A.177 Agricultural Resource Areas may take the form of zoning ordinances. Douglas County elected to protect its designated Baker Flats Agricultural Resource Area by adopting agricultural zoning pursuant to the limited zoning power delegated by RCW 36.70A.177(2)(a).

The County's Zoning Code provided for multiple land use districts. DCC 18.12.020 [copy is attached hereto at Appendix ("D")]. One of those land use districts is the "Recreational Overlay Land Use District." Two of the land use districts are AC-5 and AC-10, both agricultural districts intended to protect the Agricultural Lands Resource Area as required by RCW 36.70A.060 and RCW 36.70A.177(2)(a). Those protections exist in the form of permitted, accessory and conditional uses set forth in Douglas County Code ["DCC"] 18.34 (the AC-5 District) and DCC 18.36 (the AC-10 district) [copies of those use provisions are attached hereto collectively at Appendix ("E")]. In neither case is an active recreational trail designated in the zoning code as a permitted, accessory or conditional use for the AC-5 or AC-10 use districts. The only way to add a recreation use as a permitted use within those zoning districts was to amend them by creating and mapping a Recreational Overlay Use

District, which constitutes both a rezone and an amendment to the RCW 36.70A.060 "development regulations" previously adopted by Douglas County within the meaning of RCW 36.70A.030(7).

The EWGMHB had jurisdiction to review these modifications to the development regulations protecting the Baker Flats Agricultural Resource Area. It was error for the EWGMHB to rule otherwise.

**B. EWGMHB Jurisdiction Is Not Defeated by RCW 36.70B.020**

The lower tribunals decided, notwithstanding the fact that zoning provisions—i.e., development regulations—were clearly being changed, that RCW 36.70B.020(4) defeated EWGMHB jurisdiction. That statute provides that a "site-specific rezone authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of . . . development regulations . . ." constitutes a "project permit" (reviewable under LUPA), and is not a "development regulation" (reviewable by the EWGMHB):

**1. The R-O Decision Amended Development Regulations.**

Creation of the R-O Use District amended Douglas County's RCW 36.70A.060 and RCW 36.70A.177 Agricultural Resource Area development regulations. Amendments of such development regulations to allow uses previously not permitted constitutes a revision or amendment of those mandatory development regulations, and is categorically omitted from RCW 36.70B.020(4) "development permit" coverage.

**2. The Rezone Was Not "Site-Specific".**

A "site-specific" rezone is generally not of area-wide importance

because it affects only one or a few property owners and has no significance to the interests of the broader community. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992). But, the state legislature impressed, as a matter of statewide policy, the public interest in the protection and regulation of Agricultural Resource Areas. RCW 36.70A.170; RCW 36.70A.060; RCW 36.70A.177. Among other provisions, the state legislature provided for restricted local discretion when adopting or amending such development regulations. *King County v. Central Puget Sound Growth Management Hearings Board* [the "*soccer fields*" decision], supra.

Moreover, the state legislature provided at RCW 36.70A.050 that the Department adopt minimum guidelines that apply to all jurisdictions in the state when designating and protecting Agricultural Resource Areas.

> " (1) In classifying and designating agricultural resource lands counties must approach the effort as a county-wide or area-wide process. Counties and cities should not review resource lands designations solely on a parcel-by-parcel process . . .
>
> (2) Once lands are designated, counties and cities planning under the act must adopt development regulations that assure the conservation of agricultural resource lands. Recommendations for those regulations are found in WAC 365-196-815." (emphasis added) [WAC 365-190-050 — a complete copy is attached hereto at Appendix ("F")]

This regulation — by setting "minimum" guidelines applicable throughout the state — implements the statutory admonition contained in RCW 36.70A.177(1) that the development regulations governing the use of land with Agricultural Resource Areas both conserve agricultural lands and encourage the agricultural economy. To suggest that any rezone of

land within such a protected area can be "site-specific" disregards the special state-created rules that must be followed within such protected resource areas. This state-imposed policy, combined with the 5-mile long recreation trail length slashing through the heart of the Baker Flats Agricultural Resource Area, prevent this rezone from being characterized as "site-specific" within the meaning of RCW 36.70B.020(4).

**3. Rezone Not Authorized By Comprehensive Plan**

It is interesting that none of the Respondents and none of the lower tribunals has been able to identify any authorization for a rezone from Agricultural to Recreational Overlay anywhere within any Douglas County Comprehensive Plan ["CP" hereafter] as is contemplated by RCW 36.70B.020(4). For that matter, none have been able to point to any authorization in the County's Comprehensive Plan for a Recreational Overlay zone whatsoever. For that matter, none have been able to identify any mention in the CP of a Recreational Overlay "zone." Moreover, the CP is completely silent about Recreational Overlay Districts.

Instead, unable to satisfy the explicit statutory requirement, the Respondents and the lower tribunals acted as if the statutory criteria just did not exist. One method was to eliminate the "authorized in the CP" requirement altogether, wrongly stating that growth hearings boards have no authority to review "site-specific rezones," period. The RCW 36.70B.020(4) requirement that a "rezone" be "authorized" by the CP was changed to a 'recreational trail is mentioned in the CP.' The requirement that the rezone be "authorized" was changed to 'whether or not a trail was

"consistent with" recreational goals in the CP.' Even then, the "consistency" analysis entirely ignored that this rezone was meant to strip the Baker Flats Agricultural Resource Area of the protection of its development regulations. Moreover, that analysis incorrectly assumed that Douglas County had been delegated the discretion to do so. It had not.

**4. The EWGMHB Review Was Not Time-Barred**

No Respondent or lower tribunal has ever been able to identify a date when an appeal to the EWGMHB should have been taken, but they all agreed that such a review was "time-barred." The decision that the appeal was time-barred is based solely on the inaccurate conclusion that the current Recreational Overlay ["R-O"] rezone did not constitute an amendment of the Baker Flats Agricultural Resource Area development regulations, and that the rezone had been "authorized" in the CP . . . all invalid assumptions.

The lower tribunals all rested their decision on the inapplicable cases of *Wenatchee Sportsmen's Assoc. v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (1998) and *Woods v. Kittitas County*, supra. Between them, these two cases hold that in a LUPA case, a superior court lacks jurisdiction to evaluate a land use decision for its lack of compliance with the GMA and that the growth management hearings boards have exclusive jurisdiction to evaluate comprehensive plans and development regulations for compliance with the GMA. *Woods* construed and applied RCW 36.70B.020(4). The Court did not change the statute in any way, but did apply it to the facts of the *Woods* case, which specifically met the two-part

"site-specific rezone" and "authorized by a CP" test. The *Woods* decision did not hold that RCW 36.70B.020(4) applied to all site-specific rezones, whether or not authorized in a comprehensive plan.

Moreover, in *Woods* this Court could not apply RCW 36.70B.020(4) in the same manner to a rezone within an Agricultural Resource Area of Long Term Commercial Significance. *Woods* did not involve the mandatory "development regulation" requirements and the limited discretion involved with zoning changes within such a protected resource area. There is not a scintilla of evidence that the Douglas County CP authorized a Recreational Overlay rezone within this protected Agricultural Resource Area, or even mentioned such a zone in its CP. To now "imply" such authorization results in creating — where none previously existed — inconsistencies between the Resource Element in the CP and the balance of the CP in violation of RCW 36.70A.070 and WAC 365-196-500 [copy attached hereto at Appendix ("G")].

Recreational uses are incompatible with the many conservation, enhancement and protection obligations owed Agricultural Resource Areas. *King County (Soccer Fields)*, supra.

Had the inconsistency existed "when the CP was adopted," these Farmers could have known to appeal the Plan / Resource Area contradiction. But since the rezone was not authorized in the CP, no inconsistency existed until the decision in this case was made below. RCW 36.70B.020(4) does not apply to deprive the Farmers of their current appellate rights, as none existed until the rezone decision was actually made currently when

the Recreational Overlay zone was first proposed and created.

**ISSUES NO. 2 & 3: The Action Exceeded Delegated Discretion and Conflicted With State Law**

These two issues derive from the fact that, within a protected Agricultural Resource Area, the State GMA delegates less discretion and imposes more requirements than with other GMA provisions. A County was delegated no discretion to rezone Agricultural Resource Lands to active recreational (soccer fields) uses. *Soccer Fields*, supra. RCW 36.70A.060 and RCW 36.70A.177 require local governments to adopt development regulations that conserve and enhance the Agricultural Resource Area.

Douglas County argues that if it escapes scrutiny from the EWGMHB by a "time-bar" argument, then the County is then free to flaunt state law and to exercise power not delegated to it. The lower courts avoided these claims by arguing for county discretion that clearly does not exist within GMA Agricultural Resource Areas. This Court should visit that issue by applying the proper restrictions that inhere in the limitations and specific requirements that limit and control recreational uses in Ag. Resource Areas.

**ISSUE NO. 4: No Compliance With RCW 43.21C.030(2)(e)**

The lower tribunals have consistently confused the distinct RCW 43.21C.030(2)(e) requirement to conduct a "resource conflict" alternatives study with the different SEPA environmental impact study ["EIS"] requirement of RCW 43.21C.030(2)(c). Where resource conflicts exist, RCW 43.21(c.030(2)(e) requires the unresolved conflicts be addressed by

studying, developing, and describing alternatives to a preferred action. No such study or discussion of alternatives exists in this record. Although this is an issue of first impression in this state, the language is clear on the face of the statute. A nearly identical provision in NEPA has been held to require an alternatives analysis where unresolved conflicts exist even when an EIS is not required. *City of Aurora v. Hunt*, 749 F.2d 1457 (10th Cir. 1984) In that case this requirement was met by including a discussion of several alternatives to the preferred alternative in the EA. A review of the EA [82400-2, Vol. 4 CP page 448] prepared for this case shows that only the preferred alternative — the recreational trail cutting through the middle of the Baker Flats Agricultural Resource Area — was ever studied.

**ISSUES NO. 5-6: Reversal of Permit and Attorney Fee**

A reversal of the EWGMHB "lack of jurisdiction" decision will require reversal of the court of appeals decision and the superior court decisions dismissing the Farmers' Land Use Petitions Act ["LUPA"] and EWGMHB appeals. Of course, that will also require reversal of the attorney fee award. However, even if the Court is not inclined to reverse the Court of Appeals on the substantive issues, it should still reverse its award of attorney fees. RCW 4.84.370(1)(b) requires that before an attorney fee award can be made, the party to whom fees are awarded must demonstrate that it prevailed "in all prior judicial proceedings."

This recreational trail project application process has spanned thirteen (13) years and has generated a single record. Three appeals of Douglas County actions were taken in this case and the Farmers prevailed

by securing reversals and remands in the first two trial court cases. These Respondents failed to appeal both of these losses. The Court of Appeals interpreted "all prior judicial proceedings" to refer only to judicial proceedings under the current cause number and that interpretation is contrary to the specific language of the statute. It is not uncommon for a single proposed project to result in multiple decisions with multiple remands and multiple judicial appeals. Under this set of facts, the State of Washington cannot be deemed to have prevailed "in all prior judicial proceedings," as required by RCW 4.84.379(1) and Douglas County cannot be deemed to have prevailed at superior court as required by RCW 4.84.370(2).

## V. CONCLUSION

Farmers and their families have farmed Baker Flats on the shores of the Columbia River — some of the best orchard land in the state — for well over a century. For ten years now, they have been fighting in administrative tribunals and the lower courts to save their farms and their livelihood.

State Parks wants to develop a recreational trail right though the middle of the Baker Flats Agricultural Resource Area of Long Term Commercial Significance. This bike trail is no less in conflict with the GMA than the soccer fields this Court in 2000 prevented in its *Soccer Fields* decision, supra. Farmers are bound by the GMA's resource designation never to develop. The Court of Appeals has ruled in *Feil*, supra. that State Parks is now free to develop, and that Farmers must pay respondents' attorney fees.

*Soccer Fields* informed us that when counties designate Ag. Resource Areas, there are consequences, i.e., mandatory conservation, preservation,

enhancement, non-interference and protection, all owed to the entire agricultural economy — through adopted development regulations — as mandated in RCW 36.70A.170, RCW 36.70A.060, and RCW 36.70A.177.

*Soccer Fields* also informed us of the nature of the record that governments must produce to justify active recreation projects within such Ag. Resource Areas, mandates echoed by CTED in the "minimum requirements" set out in WAC 365-190. Douglas County provided no evidence, findings or conclusions in its record to assure that this rezone and this project meet the requirements for such recreational intrusions.

It is especially troublesome that the lower tribunals retroactively implied unexpressed "rezone authority" solely from the fact that a recreational trail was included in the County CP's recreational "wish list." *Soccer Fields* specifically held that recreational goals were inferior to agricultural mandates when the uses conflict within Ag. Resource Areas. Surely, what this Court would not allow a county to do expressly and prospectively, it cannot allow Douglas County to do retroactively and by implication.

Farmers respectfully ask the Court to reverse the lower tribunals and to require Douglas County, State Parks, and WSDOT to submit to the GMA, obligations these government respondents so desperately seek to avoid.

DATED this 4th day of October 2010.

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# TABLE OF APPENDICES

# APPENDIX "A"

Court of Appeals, Division III,
**PUBLISHED OPINION**
in
*Fiel et al. v. Eastern Washington*
*Growth Management Hearings Board, et al.*,
No. 28248-1-III
153 Wash. App. 394, 220 P.3d 1248 (2009)
dated
December 3, 2009

and

Court of Appeals, Division III,
**ORDER DENYING**
**RECONSIDERATION**
in
*Fiel et al. v. Eastern Washington*
*Growth Management Hearings Board, et al.*,
No. 28248-1-III
153 Wash. App. 394, 220 P.3d 1248 (2009)
dated
February 19, 2010

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,<br>Appellants,<br><br>v.<br><br>THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE PARKS AND RECREATION COMMISION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY,<br>Respondents. | No. 28248-1-III<br><br>Division Three |
| JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,<br>Appellants,<br><br>v.<br><br>DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; | **PUBLISHED OPINION** |

COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE PARKS AND RECREATION COMMISION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY,

Respondents.

Sweeney, J. — This is a land use case. Douglas County approved something called a recreational overlay district to accommodate an extension of a bicycle/pedestrian trail. The recreational district will "overlay" and border agricultural land used for orchards. Area orchardists objected to the overlay district and raised a number of legal and factual challenges to the county commissioners' decision to approve the overlay. We conclude that the recreational overlay district is not an amendment to the county's comprehensive plan and that, even if it was, any challenge to the comprehensive plan comes too late. We conclude that the recreational overlay district does not run afoul of state statutes that encourage the preservation of agricultural land. And we conclude that the decision to permit the overlay is amply supported by the findings of the commissioners, including those they adopted from the hearing examiner. We therefore affirm the decision of the superior court that dismissed the challenges of the orchardists to the recreational overlay district.

## FACTS

The Washington State Parks and Recreation Commission (State Parks) applied to Douglas County (County) for a permit to build a five-mile, non-motorized recreation trail along the Columbia River in the Baker Flats area of East Wenatchee, Washington. The proposed trail will link with a current trail system and extend a bicycle and pedestrian path. All of the trail

will be built on public property, including a right-of-way owned by the Washington State Department of Transportation and property owned by the Chelan County Public Utility District No. 1. The Greater East Wenatchee Area Comprehensive Plan designates the property over which the trail will run as "Tourist Recreation Commercial," "Residential Low," "Commercial Agriculture 5 acres," and "Commercial Agriculture 10 acres." Clerk's Papers (CP) at 1-6626, 1-6658. Trail systems are permitted in the tourist recreation district and are also allowed in districts zoned residential low, commercial agriculture 5, and commercial agriculture 10 under a recreational overlay district permit.

Orchardists Jack and Delaphine Feil and John and Wanda Tontz lease portions of the Baker Flats public properties that abut their orchards and they grow fruit trees on those public lands. The proposed trail, including a 10-foot-wide asphalt top plus gravel edging, and 60 to 100 foot buffers would require that nearly 24 acres of mature fruit trees be removed.

In 2004, a County hearing examiner concluded that the trail was permitted in all zoning districts as a "transportation facility" and issued a shoreline development permit to State Parks. The Feils, the Tontzes, and the Right to Farm Association of Baker Flats (we will refer to them as he Orchardists) appealed the decision to issue the permit to the shoreline hearings board. C.F. McNeal, Betty McNeal, and others filed a petition under the Land Use Petition Act (LUPA) in superior court and challenged the decision to issue the permit. In March 2005, the shoreline hearings board approved the trail permit subject to conditions. The Orchardists then petitioned the superior court for further review. The court affirmed the shoreline hearings board's decision. The Orchardists appealed that decision to this court but later abandoned that appeal. The superior court on the LUPA petition disagreed with the examiner's conclusion that the trail was a transportation facility (that would be permitted in any zone) and reversed. The court remanded with directions to State Parks to apply for permits required by

the County code.

In March 2006, State Parks then applied for a recreational overlay district permit. A recreational overlay district does not change the underlying zoning. It allows recreational activities in other zoning classifications. In November 2006, the County hearing examiner held a hearing, granted the recreational overlay designation, and issued a site plan development permit for the trail. The hearing examiner conditioned approval of the permit on a number of conditions. The examiner required that State Parks provide: (1) an agreement with beekeepers to mitigate contact between trail users and bees; (2) a trail design that will minimize "frost pockets" affecting the abutting orchards; and (3) additional steps to ensure that trail users are protected from agricultural activities (such as pesticide application) and that the orchards are protected from the trail users.

In November 2006, the Orchardists petitioned under LUPA to the superior court and challenged the hearing examiner's authority to issue a recreational overlay permit. They also petitioned for review with the Eastern Washington Growth Management Hearings Board (Hearings Board) and argued that the hearing examiner's decision to grant the overlay violated the Growth Management Act (GMA). In February 2007, the Hearings Board concluded that it had no jurisdiction to review this permit, since it was a site-specific project, and dismissed the Orchardists' GMA petition. The Orchardists appealed that decision to the superior court; the court affirmed the dismissal of the GMA petition in July 2007. The court also concluded that the recreational overlay designation amounted to a rezone and therefore the County hearing examiner did not have authority to grant the permit because the rezone required legislative action by the County commissioners. The court then remanded for further proceedings.

The County commissioners adopted the findings and conclusions of the hearing examiner, added some of their own, and approved the overlay

district. The Orchardists again petitioned for relief under LUPA in the superior court; and they again petitioned for review by the Hearings Board. Once again, the Hearings Board ruled that it did not have jurisdiction to review a site-specific rezone and dismissed the petition. The Orchardists appealed this ruling to the superior court. The superior court affirmed the County commissioners' decision to issue the permit and dismissed the LUPA petition. The following month, the superior court dismissed the petition for review of the Hearings Board's decision.

Both decisions were appealed directly to the Washington State Supreme Court. That court consolidated the **appeals** and transferred them here for our review.

## DISCUSSION

### JURISDICTION OF THE HEARINGS BOARD TO PASS ON THE COMMISSIONERS' DECISION TO ISSUE A RECREATIONAL OVERLAY PERMIT

The Orchardists first contend that the Hearings Board erred, as did the trial court, when it concluded that it did not have authority to hear this petition because it was "site specific." They argue that the effect of this recreational overlay designation is to convert land that had been zoned agricultural into something other than agricultural in violation of the comprehensive plan and state law requiring, or at least encouraging, the preservation of agricultural land. The Orchardists agree that generally challenges to a comprehensive plan or development regulations must be made within 60 days of the decision by the Hearings Board. But here, they argue, there was no way to anticipate, under the comprehensive plan as adopted and approved, that this bicycle and pedestrian path would be approved in an agricultural zone.

The County responds that this is not a rezone; that it is accommodated

by the current comprehensive plan and zoning regulations, whether it is a rezone or not; and that, therefore, the appropriate vehicle to challenge this land use action is a petition pursuant to LUPA. It argues that the challenge to the Hearings Board of the comprehensive plan comes too late. *Woods v. Kittitas County*, 162 Wash.2d 597, 614, 174 P.3d 25 (2007). The County continues that the recreational overlay is a site-specific project permit; therefore, it only requires authorization by statute and is not subject to review under the GMA. *Id.* at 610, 174 P.3d 25. And it urges that the permit meets the definition of a project permit application because it relates to a specific project for a specific use by a specific applicant that is authorized by existing zoning laws. RCW 36.70B.020(4); *Woods*, 162 Wash.2d at 613, 174 P.3d 25. Again, relying on *Woods*, the County urges that the superior court may review a project permit only by applying LUPA standards to decide whether the land use decision complies with a comprehensive plan and/or development regulations. *Woods*, 162 Wash.2d at 603, 174 P.3d 25.

The GMA was enacted in 1990 to stop uncoordinated, unplanned growth and the attendant threats to the environment. RCW 36.70A.010; *Woods*, 162 Wash.2d at 608, 174 P.3d 25. Toward that end, the legislature called for citizens, the local government, and the private sector to cooperate in "comprehensive land use planning." RCW 36.70A.010. The GMA required development of a comprehensive plan to address land use, housing, capital facilities, utilities, rural areas, and transportation. RCW 36. 70A.040, .070; *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 547, 958 P.2d 962 (1998). This comprehensive plan must set out the governing body's general land use policy. RCW 36.70A.030 (4); *Woods*, 162 Wash.2d at 608, 174 P.3d 25. The rural element of the comprehensive plan must permit rural development, forestry, agriculture, and a variety of rural densities. RCW 36.70A.070(5)(b).

Several planning goals in the GMA guide the development of a comprehensive plan and development regulations. RCW 36.70A.020; *Skagit*

*Surveyors*, 135 Wash.2d at 547, 958 P.2d 962. Among these goals is the desire to "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of ... productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8). The comprehensive plan must designate an area for urban growth and a rural area outside the urban growth area. RCW 36.70A.110(1), .070(5)(b); *Woods*, 162 Wash.2d at 608-09, 174 P.3d 25.

To implement the policies of the comprehensive plans, counties must adopt consistent development regulations. RCW 36.70A.040(3)(d), (4)(d); *Woods*, 162 Wash.2d at 609, 174 P.3d 25. Development regulations are "controls placed on development or land use activities by a county or city," including zoning ordinances. RCW 36.70A.030(7). Development regulations do not include a decision to approve a project permit application, "even though the decision may be expressed in a resolution or ordinance." *Id.* A site-specific rezone, authorized by a comprehensive plan, requires only a project permit application. RCW 36.70B.020(4).

Three growth management hearings boards enforce the GMA. *Woods*, 162 Wash.2d at 609, 174 P.3d 25. But the jurisdiction of these boards is limited. They can decide only those petitions that challenge comprehensive plans, development regulations, or permanent amendments to comprehensive plans or development regulations for compliance with the GMA. *Id.*; *Skagit Surveyors*, 135 Wash.2d at 549, 958 P.2d 962; RCW 36.70A.280(1)(a), .302. And a petition challenging a comprehensive plan or development regulation for violation of the GMA must be filed within 60 days after publication of the comprehensive plan or development regulation. RCW 36.70A.290(2).

The Orchardists contend that the recreational overlay permit approved here is a zoning amendment that they may challenge as a violation of the GMA. They note that chapter 14.32 of the Douglas County Code (DCC)

requires that all zoning amendments must be reviewed for consistency with the GMA. DCC 14.32.030, .040, .050. They insist that even site-specific rezones constitute zoning amendments that must comply with the GMA and cite DCC 14.32.040:

> A. Types of Amendments.
>
> 1. Site-specific map amendments.
>
> Site-specific plan map amendments apply to a limited geographical area controlled either by an individual property owner or all property owners within the designated area....
>
> Applications for site-specific map changes should be reviewed by the planning commission at a public hearing in June. The planning commission will make a recommendation on the proposed amendments and transmit them for final action by the Board of Commissioners at the completion of the annual comprehensive plan amendment process.

DCC 14.32.040.

We disagree with the Orchardists. A recreational overlay district is not a zoning amendment. It is rather a special use overlay of existing zones. DCC 18.12.060. The County zoning regulations designate ten zoning districts and three overlay districts, including the recreational overlay. DCC 18.12.020. The purpose of the district overlay designation is "to implement comprehensive plan policies that identify recreational activities or special opportunities for achieving public benefits by allowing uses that differ from the specific provisions set forth within the applicable zoning district." DCC 18.12.060. These overlays "are generally applied to site specific proposals on an individual property or a group of properties." *Id.* The recreational overlay does not change the zoning, it allows a recreational use that is not otherwise

allowed in a particular zone. *Id.* The commissioners did not violate the GMA by permitting this recreational overlay district in an agricultural zone.

WHETHER THE RECREATIONAL OVERLAY VIOLATES STATE LAW PROTECTING AGRICULTURAL LAND

The Orchardists next contend that this recreational overlay district violates state law calculated to protect agricultural land. And this, they argue, is so whether the recreational overlay here is characterized as a site-specific rezone or simply a permitted use. We characterize this as a permitted use, for reasons we have already discussed. But it would not make any difference in the result if we were to characterize this as a site-specific rezone. RCW 36.70A.177(1) authorizes cities and counties to use "a variety of innovative zoning techniques" in agricultural areas to "conserve agricultural lands and encourage the agricultural economy." Generally, a county or city should encourage nonagricultural uses in areas with poor soils or areas that are otherwise inappropriate for agriculture. RCW 36.70A.177(1). But whether, and to what extent, this recreational overlay, or any recreational overlay, impairs the use of this land for agriculture is, first of all, a factual question easily addressed in a LUPA action. Here, there was ample testimony to support the ultimate findings that the trail was not inconsistent with the use of this land for agriculture. We discuss this evidence in the section entitled "Substantial Evidence for Facts Supporting Recreational Overlay Designation" below.

Second, even if the use of a recreational overlay in the agricultural zone did violate RCW 36.70A.177, the Orchardists had to bring a challenge within 60 days of adoption of a comprehensive plan that accommodated the recreational overlay designation in the first place. RCW 36.70A.290(2); *Woods*, 162 Wash.2d at 614, 174 P.3d 25. The court in *Woods* recognized the potential that legislative authorities might permit uses beyond the 60-day challenge period that appeared to violate the GMA:

> Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed.

*Woods*, 162 Wash.2d at 614, 174 P.3d 25.

The Orchardists did not timely challenge the zoning regulations (ch. 18.46 DCC), as running afoul of the GMA. And that code provides for these R-O Recreational Overlay Districts that specifically include as permitted uses "Recreational trail systems." DCC 18.46.040(J).

"Document1 zzF62020588508"[6] ¶ 20 The Orchardists' essential challenge here implicates the application of these regulations, not the regulations themselves. But a hearings board's jurisdiction is limited to challenges of comprehensive plans, development regulations, and amendments to comprehensive plans and development regulations. RCW 36.70A.280(1)(a), .302; *Woods*, 162 Wash.2d at 609, 174 P.3d 25. The Hearings Board simply "does not have jurisdiction to hear a petition alleging that a site-specific rezone violates the GMA." *Woods*, 162 Wash.2d at 612, 174 P.3d 25. And that is what we are dealing with here.

LUPA is the exclusive means for judicial review of land use decisions that are not subject to review by quasi-judicial bodies such as the hearings boards. RCW 36.70C.030; *Woods*, 162 Wash.2d at 610, 174 P.3d 25. We therefore conclude that the Hearings Board properly ruled that it did not have jurisdiction to decide whether the site-specific recreational overlay adopted here complied with the GMA. *Woods*, 162 Wash.2d at 610, 174 P.3d 25.

The Orchardists rely nonetheless on two cases for the proposition that

a hearings board cannot allow non-farm uses in an agricultural resource area if to do so undermines the GMA mandate to conserve farm lands. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wash.2d 488, 495-97, 139 P.3d 1096 (2006); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 552, 14 P.3d 133 (2000). Neither case is helpful. First, each challenge in these cases apparently followed a timely challenge to adoption of development regulations and amendments to a comprehensive plan and zoning regulation-within 60 days. *Lewis County*, 157 Wash.2d at 495-97, 139 P.3d 1096; *King County*, 142 Wash.2d at 551-52, 14 P.3d 133. Second, each case addresses whether the local jurisdiction's newly adopted development regulations (*Lewis County*) or amendments to the comprehensive plan (*King County*) qualified as " innovative zoning techniques" allowed under RCW 36.70A.177(1). *Lewis County*, 157 Wash.2d at 506-08, 139 P.3d 1096; *King County*, 142 Wash.2d at 561-62, 14 P.3d 133. The recreational overlay permit here is not a new or recently-amended provision of a comprehensive plan or development regulation. Nor is it intended to be an "innovative zoning technique."

The trial court was correct: the Hearings Board did not have jurisdiction to pass on whether the recreational overlay permit complied with the GMA.

## OVERLAY DISTRICT-SITE-SPECIFIC-AUTHORIZED BY THE COMPREHENSIVE PLAN

The Orchardists next argue that the trail is not a "site-specific" rezone authorized by the comprehensive plan and does not, therefore, qualify for a project permit. They argue that a 200-foot wide corridor five miles long is hardly "site-specific." Indeed, they urge that under pre-GMA cases, a 200-foot wide, five-mile long corridor zoned differently from the land on either side could never qualify as a site-specific rezone. They also note that the County's comprehensive plan does not even mention recreational overlays.

The County responds that, first of all, the land use must only generally conform, not strictly conform, to the comprehensive plan, citing *Woods*, 162 Wash.2d at 613-14, 174 P.3d 25. And the permits here are narrowly applied. They focus on the trail surface and buffers on specific public land. The underlying zoning of the land within or adjacent to the trail does not change by the imposition of a recreational overlay district. No area-wide zoning is involved and so the permits are site-specific.

A site-specific rezone involves specific parties requesting a classification change for a specific tract. *Id.* at 611 n. 7, 174 P.3d 25. Here, there is no change to the zoning classification of land underlying or contiguous to this overlay district. And a defined trail across public land is a site-specific tract. *Id.*

Again, a site-specific rezone is a project permit under RCW 36.70B.020(4) if it is authorized by a comprehensive plan or development regulations. *Woods*, 162 Wash.2d at 610, 174 P.3d 25. The Orchardists contend the recreational overlay district here is not authorized by the comprehensive plan because the County's comprehensive plan does not mention recreational overlays and specifically discourages non-agricultural uses in agricultural areas. *See* Douglas County Countywide Comprehensive Plan § 5.2.3 (*Agricultural Goals and Policies*) (amended Jan. 28, 2003). CP 0-1561. But a site-specific rezone need not be expressly included in a comprehensive plan as a permitted use. The comprehensive plan is a general blueprint for land use decisions; it does not directly regulate, nor was it intended to regulate directly, site-specific land uses. *Woods*, 162 Wash.2d at 613, 174 P.3d 25. "Thus, a proposed land use decision must only generally conform, rather than strictly conform, to the comprehensive plan." *Id.* (emphasis omitted).

And yes, the comprehensive plan here sets out a goal to preserve, enhance, and maintain agricultural uses "to the greatest extent possible." CP at 0-1561. But the same plan also encourages the "developing trail system"

in East Wenatchee as an alternative mode of transportation. CP 0-1529. It encourages the commissioners to promote public access to bodies of water through trails. And the plan encourages coordinated bicycle and pedestrian ways for access to parks and shorelines.

The Greater East Wenatchee Comprehensive Plan supports extension of the trail system, citing the "healthy recreation opportunities" and the "personal mobility options" that will lighten the load on the transportation systems. CP at 0-0186. And the Greater East Wenatchee Comprehensive Plan specifically states that "[t]he current trail system should be increased to extend north to connect with Lincoln Rock State Park." CP at 0-0188. We then conclude that the extension of the trail here is consistent with the policies of both the Greater East Wenatchee and Douglas County Countywide Comprehensive Plans.

Moreover, the recreational overlay permit for the trail is authorized by County development regulations, including DCC 18.46.010. That code section specifically provides that

> [t]he purpose of the R-O recreational overlay district is to provide for the continuance of public and private parks and other outdoor recreational facilities in order to encourage the development of additional active recreational facilities in Douglas County, and to maintain adequate buffers between recreational developments and surrounding land uses.

DCC 18.46.010. The same code permits these recreational overlay districts wherever they are not prohibited. DCC 18.46.020. And they are not prohibited where they are proposed here.

¶ 31 Recreational trails are a permitted use in a recreational overlay district. DCC 18.46.040(J). And these trails are not prohibited by agricultural development regulations. *See* DCC 18.34.050, DCC 18.36.050. The Orchardists

are correct that "pedestrian/bicycle access corridors" are discouraged in agricultural lands of long term commercial significance. DCC 18.16.150(I). But the development standards of the recreational overlay regulations ensure that an ***411** application is reviewed for its potential effect on surrounding properties, including agricultural resource lands. DCC 18.46.070.

We conclude then that the recreational overlay district is both site-specific and consistent with the comprehensive plans and County development regulations. *Woods*, 162 Wash.2d at 613, 174 P.3d 25. This recreational overlay district was properly reviewed as a project permit rather than as a rezone. RCW 36.70B.020(4).

## SUBSTANTIAL EVIDENCE FOR FACTS SUPPORTING RECREATIONAL OVERLAY DESIGNATION

The Orchardists next contend that the County commissioners' findings used to support their decision to approve the recreational overlay are not supported by substantial evidence. The commissioners adopted the November 2006 findings and conclusions of the hearing examiner and added their own findings and conclusions. The Orchardists assign error to the hearing examiner's findings (1) that rely on the decision of the shoreline hearings board; (2) that state that the Washington State Department of Transportation was a proper applicant; (3) that fail to show authorization by the comprehensive plans; (4) that use a "mitigation" standard rather than a "protection" standard for agricultural areas; (5) that ignore buffer requirements; (6) that say that the State Environmental Policy Act (SEPA) requirements were met; and (7) that beekeepers' concerns are mitigated. They also challenge the commissioners' findings because they (8) do not consider the GMA requirements for innovative zoning techniques; (9) fail to show that alternatives to the trail site were considered or that mandatory development standards were met; and (10) approve a site plan that exceeds the scope of the recreational overlay zone.

We review land use decisions under LUPA. RCW 36.70C.130(1). We, like the superior court, apply the LUPA standards of review directly to the County commissioners' decision. *Henderson v. Kittitas County*, 124 Wash.App. 747, 752, 100 P.3d 842 (2004). The Orchardists must show that: (a) the entity that made the land use decision did not follow the correct process, unless the error was harmless; (b) the decision is an erroneous interpretation of the law, considering the deference given to local interpretation of the law; (c) the decision is not supported by substantial evidence; (d) the decision is a clearly erroneous application of the law to the facts; (e) the decision is outside the jurisdiction of the entity making the decision; or (f) the decision violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1).

We review challenges to the factual findings that underlie the land use decision for substantial evidence. *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wash.App. 920, 928, 180 P.3d 848,*review denied*,164 Wash.2d 1031, 197 P.3d 1184 (2008). And, just like other challenges to factual findings that come before this court, we view the evidence in a light most favorable to the party that prevailed. *Woods*, 162 Wash.2d at 617, 174 P.3d 25. State Parks and the County prevailed before the County commissioners and so we review the record that was before the commissioners in the light most favorable to the respondents. *Id.*

This record contains nearly 9,000 pages of administrative proceedings. It includes extensive testimony and exhibits that speak to the advantages and disadvantages of the trail extension proposed here. The hearing examiner reviewed the record after an open public hearing. And his findings are easily supported by the evidence.

Specifically, he correctly notes that the Greater East Wenatchee Comprehensive Plan "places significant importance on the protection of agricultural lands" and requires minimal disruption of agricultural activities.

CP at 1-6628; *see* CP at 0-3859 ("[a]gricultural uses will be preserved, enhanced, and maintained to the greatest extent possible"). The hearing examiner lists a variety of measures that mitigate the effects on agriculture, including enhanced setbacks and buffers, gates at both ends of the agricultural area that can be closed during certain agricultural operations, fencing and additional security measures, elimination of noxious weeds, and coordination with beekeepers for trail closure during periods of peak bee activity. Certainly, a number of people testified that orchard activities were incompatible with this trail. But the hearing examiner found that "the more convincing testimony" was "that orchard activities, pedestrians and bicyclists can co-exist in the same proximity, just as they have for over 100 years." CP at 1-6629.

The hearing examiner's finding that State Parks complied with SEPA procedures is supported by the record and by a superior court ruling in *McNeal v. Douglas County,* No. 04-2-00045-6 (Douglas County Superior Court). CP at 0-1735, 0-3663, 0-7842. The superior court ruled that compliance with SEPA need not be reviewed further unless there were changes to the proposed project that would adversely affect the environment. *See* WAC 197-11-600(3)(b) (an environmental document may be used by an agency until there are substantial changes that would likely have a significant adverse impact). No changes in this project would prompt a new SEPA review.

The Orchardists also argue that the hearing examiner and the County commissioners failed to make certain necessary findings, specifically regarding compliance with the GMA and with County buffering ordinances. But, again, neither the hearing examiner nor the commissioners had jurisdiction to consider compliance with the GMA. And, therefore, they had no duty to enter findings to address GMA requirements under RCW 36.70A.177. Buffers were adequately covered in the hearing examiner's findings and attached conditions of approval. The findings refer to the buffers established in the permit application, and the application in turn promises compliance with the

buffer requirements of the County code. DCC 18.46.080.

The Orchardists also contend the hearing examiner failed to find that construction of the trail would comply with DCC 19.18.035(2). That code section states that trail facilities must "minimize the removal of trees, shrubs, snags and important habitat features." DCC 19.18.035(2). It is calculated to protect trees and shrubs naturally growing in the area. State Parks addressed this in the permit application; no native trees will be removed from this area.

The Orchardists label some findings as inappropriate. Appellants' Br. at 43-47. But those findings are not relevant to the decisions of the hearing examiner and County commissioners. For example, the Orchardists contend that the hearing examiner inappropriately relied on the decision of the shoreline hearings board. Not so. The hearing examiner merely includes the shoreline development permit process in his summary of the trail permit proceedings. And the County commissioners entered several findings that express their disagreement with the superior court's conclusion that the hearing examiner had no authority to issue the trail project permit. Yet the County commissioners considered the permit as ordered.

The Orchardists also contend that the County commissioners should have included findings that State Parks (1) failed to study appropriate alternatives to the trail site, (2) did not comply with County regulations on buffers (DCC 18.46.070(A)), and (3) should have required the signatures of each applicant and property owner on the project application (DCC 14.06.010(B)(7)). The hearing examiner, however, included findings on each of these points. His findings were adopted by the County commissioners. He found that State Parks considered alternative routes and has proposed buffers and setbacks to minimize the impact on agriculture. The Department of Transportation is a property owner, and the Orchardists complain that the department did not sign the application as required by DCC 14.06.010(B)(7). But we find no authority to impose what we conclude is a hypertechnical

reading of the code. The Department of Transportation verified that it was aware of the project and authorized the State Parks by letter to represent its interests in the application process. That is sufficient.

The findings here are supported by this record.

WHETHER THE SIZE OF THE TRAIL WITH BUFFERS EXCEEDS THE OVERLAY

The Orchardists next contend the County commissioners approved a site plan that is up to 220 feet wide, including buffers, and this exceeds the 20-foot-wide recreational overlay. They argue that approval of a recreational overlay district authorizes only the specific overlay proposed. DCC 18.46.030(A), cited by the Orchardists, states that approval of a recreational overlay application "shall be based on a specific site design authorizing only the specific development proposed, unless amended." The specific site design here includes buffers from 60- to 100-feet-wide on each side of the trail. The approved recreational overlay district did not exceed the scope of the proposed development.

WHETHER THE COMPREHENSIVE PLAN CONFLICTS WITH GENERAL LAWS OF THE STATE PROTECTING AGRICULTURAL LANDS

The Orchardists contend that the Douglas County Countywide and Greater East Wenatchee Comprehensive Plans and development regulations are void because they permit what the GMA prohibits: recreational zoning in an agricultural resource area of prime soil. And for that reason, the Orchardists urge that the commissioners have run afoul of article XI, section 11 of the state constitution.

Article XI, section 11 of the state constitution allows local governments to adopt regulations that are not in conflict with general law. *State v. Kirwin*, 165

Wash.2d 818, 825, 203 P.3d 1044 (2009). A local regulation conflicts with general law if it permits what state law forbids or forbids what state law permits. *Id.* An ordinance or regulation that conflicts with a statute is invalid. *Id.* at 826, 203 P.3d 1044.

The Orchardists contend that the comprehensive plans and development regulations authorizing a recreational overlay in an agricultural resource area conflict with RCW 36.70A.177. This provision of the GMA states that a county or city *may* use innovative techniques to conserve agricultural lands and encourage the agricultural economy. RCW 36.70A.177 (1). And the statute encourages a county or city to limit nonagricultural uses to areas of poor soil or otherwise unsuited to agriculture. *Id.* First, these are statements of planning goals; they do not prohibit nonagricultural uses in areas of good soil. *See Viking Props., Inc. v. Holm*, 155 Wash.2d 112, 125, 118 P.3d 322 (2005) (the GMA is a framework that guides local jurisdictions in the formation of comprehensive plans and development regulations). County regulations that establish recreational overlay districts in agricultural areas do not then permit a land use that is prohibited by the GMA. Second, any potential interference with use of this land as agricultural can be, and was, addressed here with conditions and limitations imposed as part of the approval process. Accordingly, neither the development regulations nor the comprehensive plans here are constitutionally invalid. *Kirwin*, 165 Wash.2d at 826, 203 P.3d 1044.

ATTORNEY FEES

Both the County and State Parks request attorney fees and costs pursuant to RCW 4.84.370. The statute mandates fees and costs to the prevailing party or substantially prevailing party on appeal of a decision to issue, condition, or deny a development permit involving a site-specific rezone. RCW 4.84.370(1). An award under this statute is limited, however, to a prevailing party on appeal who was the prevailing party or substantially

prevailing party in *all* prior judicial proceedings. RCW 4.84.370(1)(b).

The Orchardists note that State Parks and the County did not prevail in previous judicial proceedings. The superior court reversed the hearing examiner's approval of the trail as a transportation facility and reversed the hearing examiner's grant of the recreational overlay. In both cases, the court concluded that the hearing examiner did not have authority to make those decisions. Eventually, State Parks and the County obtained the recreational overlay permit and site plan approval from the County commissioners. State Parks and the County prevailed in the September 2008 superior court review of the recreational overlay resolution and in the October 2008 superior court review of the Hearings Board's dismissal of the petition for review.

The appeal before this court is limited to the Orchardists' challenges to the County commissioners' resolution. State Parks and the County are then the prevailing parties and are entitled to the attorney fees and costs on appeal.

We affirm the decisions of the superior court that dismissed the challenges of the Orchardists to the recreational overaly district.

WE CONCUR: SCHULTHEIS, C.J., and KORSMO, J.

# COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

**JACK FEIL and DELAPHINE FEIL; et al.,** **No. 28248-1-III**

**Appellants,**

**v.**

**EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; DO COUNTY; et al.,**

**Respondents.**

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of December 3, 2009, is denied.

DATED: February 19, 2010.

FOR THE COURT:

*Teresa C. Kulick*

TERESA C. KULIK
Chief Judge

# APPENDIX "B"

Douglas County Notice of Incomplete Application dated 2/22/02

Douglas County
Transportation & Land Services
470 Ninth Street NE
East Wenatchee, WA 98802

Jim Barker
Administrator
Transportation
& Land Services

Phone:
(509) 884-7173

Peter Ringsrud
County Engineer

Phone:
(509) 884-7173

Mark Kulaas
Land Services
Director

Phone:
(509) 884-7173

Fax:
(509) 886-3954

Internet:
www.douglascountywa.net

# NOTICE OF INCOMPLETE APPLICATION

February 22, 2002

William E. Fraser
Washington State Parks and Recreation Commission
2201 North Duncan Drive
Wenatchee, WA 98801-1007

| | |
|---|---|
| OWNERS: | Chelan County PUD #1 & WSDOT |
| APPLICANT: | Washington State Parks and Recreation Commission |
| PROJECT: | Conditional use permit; request for recreational overlay district designation; shoreline substantial development application |
| LOCATION: | The subject property is located within WSDOT ownership and Chelan County PUD ownership extending from the proximity of Obadashin Bridge to Lincoln Rock State Park. |

Dear Mr. Fraser:

The application materials you submitted on January 28, 2002 for the above noted applications were considered incomplete on February 22, 2002. Staff has the following comments that need to be addressed before our office can consider your application complete:

1. DCC 14.06.010(B)(7) requires the signature of each applicant or the applicant's representative, and each property owner if different than the applicant(s), on applications for development permits. There is no exception in law for state agencies. The Washington State Department of Transportation, as a property owner in the project site, has not signed the application or otherwise indicated its authorization for the application or consented to the acknowledgements on the application forms.
2. Include narrative on stormwater retention measures and applicable calculations.
3. Provide the scale for the project site plan maps.
4. A threshold analysis of traffic impacts associated with the increased use of parking facilities must be completed. Results of said analysis may determine whether additional study is necessary.
5. Provide an analysis of current parking needs for the existing parking facilities and determine the parking demands generated from the proposed use.

Parking standards are cumulative, both current needs and the parking demands from the project must be addressed. A determination should be made from the analysis as to whether additional parking facilities are necessary.

6. Geologically hazardous areas per DCC Chapter 19.18D, also include any area potentially unstable as a result of rapid stream incision or stream bank erosion; and areas located in a canyon or ravine, or on a bluff. Surface drainage shall not be directed across the face of a bluff or into a ravine. If drainage must be discharged from the bluff into adjacent waters, it shall be collected above the face of the bluff and directed t the water by use of a sealed drain pipe and provided with an energy dispersing device.

   A geologic assessment must be conducted which indicates that there will be no decrease in slope stability on the site nor on adjacent properties; that there is no hazard as proven by evidence of no past geologically hazardous activity in the vicinity of the proposed development and an analysis of slope stability indicates no significant risk to the development proposal and adjacent properties; and that the geologically hazardous area can be modified or the development proposal can be designed such that the hazard is eliminated or mitigated, making the site as safe as one without a hazard. This assessment must be prepared and certified by a geologist and or a geotechnical engineer; or an engineer or an engineering geologist, who is knowledgeable of regional geologic conditions and who derives his or her livelihood from employment in one of these specialized fields. If the consultant is unable to certify to the above conditions without a geotechnical report, then a geotechnical report shall be required.

7. Application fees for the project application must be submitted. The shoreline substantial development permit fee is $400.00, plus actual expenses. The conditional use permit fees are $350.00, plus actual expenses. The Recreational Overlay District Zoning Change request is $500.00, plus actual expenses. Grading and excavation permit fees are to be determined at a later date. Actual expenses for project application review and processing shall be calculated and submitted for payment, if necessary, prior to public hearing. Total application review fees due at this time are: $1,250.00.

8. A general plan for trail operations to address potential hazards associated with multi-modal use of the facilities is required.

9. An analysis of: crop varieties present; agricultural activities and practices; and spray timing and duration tied to agricultural crop variety or type, for the evaluation of impacts associated with agriculture and the multi-modal use of the trail is necessary. Planning staff suggests consultation with the Wenatchee Valley College tree fruit program or the WSU agricultural research program locally.

10. A width of 20' for the Recreational Overlay District has been requested. However, the application materials discuss potential widths of up to 25' for

corridors, and associated view platforms and benches. The total area proposed for use needs to be addressed by the conditional use permit, shoreline permit and Recreational Overlay District requests. DCC, Section 18.46.030 states, "Approval of an application shall be based on specific site design authorizing only the specific development proposed, unless amended". The WSDOT has asked that the District be limited to 20'. This discussion must be agreed to and worked out between the property owners and applicant. The final agreed upon area must be specified within the area requested for project consideration and review on the site plan. The potential removal of the Recreational Overlay District for highway use would not be a condition for planning staff to recommend, but must rather be agreed to by the applicant and property owner and then proposed specifically within the application for hearing examiner consideration.

11. The number of copies of application materials and their format, for public and agency review, needs to be discussed between the applicant and planning staff. Additional copies will be required, pending this discussion.

12. Specific access points to the water have not been identified on the site plan. Is it the intent of the application not to provide access points directly to the water? What measures does the applicant propose to protect buffer areas from disturbance by the public accessing the shoreline? If the applicant does propose specific access points, please indicate the locations and mitigation measures necessary to protect pertinent habitat.

13. Aquatic Habitat Conservation Areas in the form of riparian vegetation and aquatic habitat on the Columbia River affect the project application. In addition it appears that wetlands may be within 100 feet of the proposed trail facilities. The project proposal is considered a major development pursuant to Douglas County's critical area regulations. As such, a 100' buffer is required adjacent to the above described three habitat types. Buffers for aquatic habitat begin at the ordinary highwater mark extending 100' back landward. Buffers for riparian vegetation begin at the boundary of the riparian vegetation and extend 100' back landward. Buffers for wetlands extend 100' from the wetland edge. Major development associated with the above habitat types requires the submittal of a wetland mitigation plan and fish and wildlife mitigation plan per the requirements of DCC, Chapter 19.18. It appears that significant mitigation measures have been proposed for the project site. However, an evaluation of the impact to the buffer and habitat areas has not fully been addressed.

    The county buffer requirement is not 60', but is rather 100' for the habitat buffer areas noted above. A habitat boundary assessment is needed for wetlands and riparian areas along with a determination of the trail area affected by these buffers or habitat areas. Discussion of mitigation measures must address the ability of mitigation, utilizing best available science, to locate within buffer or habitat areas while still maintaining habitat structure, functions and values and consistency with the county code.

The application materials discuss wetlands but state that the project will not affect these areas. A boundary survey with an analysis of wetland and buffer width locations in relationship to the trail is necessary to verify this determination. Many of the map inserts for the project indicate the presence of potential wet areas. Staff could not verify the symbols on the site map as there was not a legend but it appeared that these may be wetlands if the symbols were consistent with those used on other maps.

Planning staff requests that the applicant meet with staff to discuss the above noted issues. Due to the volume of application materials, planning staff may have missed items that would satisfy the above noted requests. Please provide the above noted materials or indicate where such items have already been addressed in the application. If a meeting is possible, please contact me to discuss possible meeting times. It appears that the majority of work for a complete application has been completed, but the remaining items must be addressed and submitted before a notice of complete application and further processing of the application materials can occur. The Douglas County Transportation and Land Services Department is officially stopping the 120 day permit approval timeline, as required by Title 14 of the DCC. If you have any questions call me at (509) 884-7173.

Sincerely,

Glen A. DeVries, A.I.C.P.
Senior Planner - Permit Center Coordinator

C: Jonathan Ives, Jones & Stokes

# APPENDIX "C"

Letter from Douglas County Prosecutor to
WSDOT's Director of Real Estate Services
dated 7/23/03

Steven M. Clem
**Douglas County Prosecuting Attorney**

**Eric C. Biggar** *Chief Deputy* | **W. Gordon Edgar** *Deputy* | **Nancy A. Harmon** *Deputy* | **Nancy Willms** *Administrative Assistant* | **Jenny A. Schlaman** *Victim-Witness Coordinator*

July 23, 2003

Mr. Gerald L. Gallinger
Director, Real Estate Services
Washington State Department of Transportation
P.O. Box 47300
Olympia, WA 98504-7300

FILE COPY

Re: Rocky Reach Trail

Dear Mr. Gallinger:

The correspondence between you and Mark Kulaas, the Douglas County Land Services Director, has come to my attention. Your letter dated July 17, 2003, contains a misstatement of my statements during the referenced October 17, 2002, meeting.

I did not resolve the issue of county jurisdiction "by agreeing that Douglas County would not require a recreational overlay change for the trail that would be located on state-owned right of way," as stated in your letter. At that meeting I merely suggested that the Rocky Reach Trail project be pursued by the proponents as a multi-modal transportation component of US2/97, rather than an unrelated recreational use. I opined that the development of the right-of-way for transportation purposes would eliminate the need for a zoning change involving a recreational overlay. My suggested approach was adopted.

Further, your assertion that your characterization of my statements was adopted by me, and by extension, Douglas County, by a failure to correct an unspecified email communication is without any legal basis.

With respect to the ability of the county to assert zoning jurisdiction over non-transportation based development of state rights-of-way, WSDOT has an opinion and Douglas County has a differing opinion. The need for disagreement has been eliminated by a change in the Rocky Reach Trail proposal to a transportation component of US2/97. If the disagreement arises in the future, then WSDOT and Douglas County may take whatever action the situation then requires.

Sincerely,

/s/ Steven M. Clem

Steven M. Clem
Prosecuting Attorney

P.O. Box 360 · Waterville, Washington 98858-0360 · (509) 745-8535 · Fax (509) 745-8670

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# APPENDIX "D"

DCC Ch. 18.12
Use Districts Designated

# Chapter 18.12
# USE DISTRICTS DESIGNATED

Sections:



## 18.12.020 Zoning districts and map designations.

In order to accomplish the purposes of this title and Chapters 36.70 and 36.70A RCW the following zoning district categories and zoning map symbols are established:

| Zoning Category | Zoning Designation | Abbreviation/ Map Symbol |
|---|---|---|
| A. | Rural. | |
| 1. | Rural recreation | R-REC |
| 2. | Rural resource 2 | RR-2 |
| 3. | Rural resource 5 | RR-5 |
| 4. | Rural resource 20 | RR-20 |
| 5. | Rural service center | RSC |
| B. | Agricultural. | |
| 1. | Commercial agriculture 5 | AC-5 |
| 2. | Commercial agriculture 10 | AC-10 |
| 3. | Dryland agriculture | A-D |
| C. | Recreation/Airport. | |
| 1. | Recreation overlay | R-O |
| 2. | Airport overlay | AP-O |
| D. | Industrial. | |
| 1. | General industrial | I-G |
| E. | Property-Specific Development and Permits. | |
| 1. | Master planned resort | MPR |
| 2. | Master planned overlay district | MP-O |

(Ord. TLS 08-03-05 Exh. B (part): Res. TLS 04-39 Att. (part): Ord. TLS 01-04-07B Exh. B (part): Ord. TLS 00-02-06 Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.12.040 Zoning district and map designation purpose.**

The purpose statements for each zoning district and map designation set forth in the respective chapters shall be used to guide the application of the districts and designations to all lands in unincorporated Douglas County. The purpose statements shall also guide interpretation and application of development regulations within the districts and designations, and any changes to the range of permitted uses within each district through amendments to this title. (Ord. TLS 08-03-05 Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.12.060 Map designation—District overlay.**

The purpose of the district overlay designation established within the DCC is to implement comprehensive plan policies that identify recreational activities or special opportunities for achieving public benefits by allowing uses that differ from the specific provisions set forth within the applicable zoning district. District overlays are generally applied to site specific proposals on an individual property or a group of properties. Not every property in which the overlay district may be applied will meet the minimum provisions and policies set forth in the comprehensive plan. (Ord. TLS 08-03-05 Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

Compile Title

---

# APPENDIX "E"

DCC Ch. 18.34 & .36
AC-5/10 Commercial Agriculture Districts

# Chapter 18.34
# AC-5 COMMERCIAL AGRICULTURE DISTRICT

Sections:



## 18.34.010 Purpose.

The purpose of the AC-5 commercial agriculture district is to provide a variety of lifestyles, including hobby farms, while protecting the commercial agricultural activities in the vicinity. This district provides an opportunity for a variety of lifestyles to intermingle, but strives to protect the primary activity, agriculture. The district is intended to provide a buffer and transition area between the urban growth boundary and more intense commercial agricultural districts. (Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

## 18.34.020 Permitted uses.

The following uses are permitted outright in the AC-5 district:

A. Agricultural uses such as the cultivation of fruit and nut trees, grape vines, row crop production, nonretail greenhouses and nurseries and other horticultural stock and the keeping of livestock and poultry, subject to DCC Chapter 18.16;

B. Aquaculture;

C. Single-family dwelling;

D. Duplex dwelling, subject to the density provisions established in DCC Section 18.34.080;

E. Agricultural support activities for Ag-to-Ag transfers, family farm support divisions, and limited lot segregations pursuant to DCC Chapter 18.16 and the density provisions set forth in DCC Section 18.34.080;

F. One single-story nonresidential accessory structure for the storage of personal property, such as a private garage or storage shed, not to exceed one thousand one hundred seventy-six square feet, as measured around the building perimeter;

G. Bed and breakfast operations with three or fewer rooms;

H. Riding stables, horse boarding/training facilities;

I. Clustering of existing lots in accordance with DCC Section 18.16.044;

J. Cluster divisions in accordance with DCC Section 18.16.046; and

K. Utility distribution/transmission facility in accordance with DCC 18.16.320. (Ord. TLS 09-10-49D Exh. B (part); Ord. TLS 05-02-34B Att. B (part): Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.34.030 Accessory uses.**
The following are considered accessory uses to the permitted uses:

A. In-home day care;

B. Home fruit stands in accordance with DCC Chapter 18.16;

C. Accessory buildings not exceeding a cumulative total of ten thousand square feet, as measured around the building perimeter, for the storage of personal property, including private garages;

D. Accessory structures for the keeping and raising of livestock/poultry and general farming including barns, shops, and shelters, provided the agricultural products are produced on-site or on other lands owned/controlled by the land owner/operator;

E. Agritainment activities;

F. Agricultural accessory housing for workers employed in the owner's operation, in accordance with DCC Chapter 18.16; and

G. Accessory dwelling units subject to the provisions of DCC Chapter 18.16. (Ord. TLS 05-01 Att. B (part): Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 01-04-07B Exh. B (part); Ord. TLS 00-02-06 Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.34.040 Conditional uses.**
Those uses designated in the conditional use permit matrix as conditional uses and approved pursuant to DCC Chapter 18.80; provided, that the development standards of this chapter are met. (Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.34.050 Prohibited uses.**
The following are prohibited uses in the AC-5 district:

A. Accumulation of junk materials;

B. Advertising displays or structures;

C. Signs, except as provided in DCC Chapters 18.80 and 20.44;

D. Mineral extraction;

E. Commercial feed or sales lots for swine, poultry and livestock;

F. Vehicle, equipment, implement or appliance repair. (Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

# Chapter 18.36
# AC-10 COMMERCIAL AGRICULTURE DISTRICT

Sections:



## 18.36.010 Purpose.

The purpose of the AC-10 commercial agriculture district is to encourage agricultural development through the maximum cultivation and reclamation of lands by restricting incompatible uses within such areas. It is also the purpose to preserve and encourage existing and future agricultural land uses as viable, permanent land uses, and as a significant economic activity within the community. Douglas County recognizes and acknowledges the importance of agricultural lands and activities to its livelihood. Production of food and fiber, and associated support activities including transportation are the primary land uses in this district. (Ord. TLS Ord. 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

## 18.36.020 Permitted uses.

The following uses are permitted outright in the AC-10 district:

A. Agricultural uses such as the cultivation of fruit and nut trees, grape vines, row crop production or other horticultural stock, nonretail greenhouses and nurseries, and the keeping of livestock and poultry, subject to DCC Chapter 18.16;

B. Agriculturally related industry;

C. Aquaculture;

D. Single-family dwelling;

E. Duplex dwelling, subject to the density provisions established in DCC Section 18.36.080;

F. Agricultural support activities for Ag-to-Ag transfers, family farm support divisions, and limited lot segregations pursuant to DCC Chapter 18.16 and the density provisions set forth in DCC Section 18.36.080;

G. One single-story nonresidential accessory structure for the storage of personal property, such as a private garage or storage shed, not to exceed one thousand one hundred seventy-six square feet, as measured around the building perimeter;

H. Bed and breakfast operations with three or fewer rooms;

I. Riding stables, horse boarding/training facilities;

J. Clustering of existing lots in accordance with DCC Section 18.16.044;

K. Cluster divisions in accordance with DCC Section 18.16.046;

L. Short-term inert waste storage/treatment piles; and

M. Utility distribution/transmission facility in accordance with DCC Section 18.16.320. (Ord. TLS 09-10-49D Exh. B (part); Ord. TLS 05-02-34B Att. B (part): Res. TLS 04-39 Att. (part): Ord. TLS Ord. 03-01-01B Exh. B (part): TLS 01-04-07B Exh. B (part); Ord. TLS 97-10-71B Exh. F (part))

**18.36.030 Accessory uses.**
The following are considered accessory uses to the permitted uses:

A. In-home day care;

B. Home fruit stands in accordance with DCC Chapter 18.16;

C. Accessory buildings not exceeding a cumulative total of ten thousand square feet, as measured around the building perimeter, for the storage of personal property, including private garages;

D. Accessory structures for the keeping and raising of livestock/poultry and general farming including barns, shops, and shelters, provided the agricultural products are produced on-site or on other lands owned/controlled by the land owner/operator;

E. Agritainment activities;

F. Agricultural accessory housing for workers employed in the owner's operation, in accordance with DCC Chapter 18.16; and

G. Accessory dwelling units subject to the provisions of DCC Chapter 18.16. (Ord. TLS 05-01 Att. B (part): Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 01-04-07B Exh. B (part); Ord. TLS 00-02-06 Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.36.040 Conditional uses.**
Those uses designated in the conditional use permit matrix as conditional uses and approved pursuant to DCC Chapter 18.80; provided, that the development standards of this chapter are met. (Ord. TLS 03-01-01B Exh. B (part): Ord. TLS 97-10-71B Exh. F (part))

**18.36.050 Prohibited uses.**
The following are prohibited uses in the AC-10 district:

A. Accumulation of junk materials;

B. Advertising displays or structures;

# APPENDIX "F"

WAC 365-190-050
Agricultural Resource Lands

**WAC 365-190-050 Agricultural resource lands.** (1) In classifying and designating agricultural resource lands, counties must approach the effort as a county-wide or area-wide process. Counties and cities should not review resource lands designations solely on a parcel-by-parcel process. Counties and cities must have a program for the transfer or purchase of development rights prior to designating agricultural resource lands in urban growth areas. Cities are encouraged to coordinate their agricultural resource lands designations with their county and any adjacent jurisdictions.

(2) Once lands are designated, counties and cities planning under the act must adopt development regulations that assure the conservation of agricultural resource lands. Recommendations for those regulations are found in WAC 365-196-815.

(3) Lands should be considered for designation as agricultural resource lands based on three factors:

(a) The land is not already characterized by urban growth. To evaluate this factor, counties and cities should use the criteria contained in WAC 365-196-310.

(b) The land is used or capable of being used for agricultural production. This factor evaluates whether lands are well suited to agricultural use based primarily on their physical and geographic characteristics. Some agricultural operations are less dependent on soil quality than others, including some livestock production operations.

(i) Lands that are currently used for agricultural production and lands that are capable of such use must be evaluated for designation. The intent of a landowner to use land for agriculture or to cease such use is not the controlling factor in determining if land is used or capable of being used for agricultural production. Land enrolled in federal conservation reserve programs is recommended for designation based on previous agricultural use, management requirements, and potential for reuse as agricultural land.

(ii) In determining whether lands are used or capable of being used for agricultural production, counties and cities shall use the land-capability classification system of the United States Department of Agriculture Natural Resources Conservation Service as defined in relevant Field Office Technical Guides. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys, and are based on the growing capacity, productivity and soil composition of the land.

(c) The land has long-term commercial significance for agriculture. In determining this factor, counties and cities should consider the following nonexclusive criteria, as applicable:

(i) The classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service;

(ii) The availability of public facilities, including roads used in transporting agricultural products;

(iii) Tax status, including whether lands are enrolled under the current use tax assessment under chapter 84.34 RCW and whether the optional public benefit rating system is used locally, and whether there is the ability to purchase or transfer land development rights;

(iv) The availability of public services;

(v) Relationship or proximity to urban growth areas and to markets and suppliers;

(vi) Predominant parcel size;

(vii) Land use settlement patterns and their compatibility with agricultural practices;

(viii) Intensity of nearby land uses;

(ix) History of land development permits issued nearby; and

(x) Land values under alternative uses.

(4) When designating agricultural resource lands, counties and cities may consider food security issues, which may include providing local food supplies for food banks, schools and institutions, vocational training opportunities in agricultural operations, and preserving heritage or artisanal foods.

(5) When applying the criteria in subsection (3)(c) of this section, the process should result in designating at least the minimum amount of agricultural resource lands needed to maintain economic viability for the agricultural industry and to retain supporting agricultural businesses, such as processors, farm suppliers, and equipment maintenance and repair facilities. Economic viability in this context is that amount of designated agricultural resource land needed to maintain the economic viability of the agricultural sector in the county over the long term.

(6) Counties and cities may further classify additional agricultural lands of local importance. Classifying additional agricultural lands of local importance should include, in addition to general public involvement, consultation with the board of the local conservation district and the local committee of the farm service agency. It may also be useful to consult with any existing local organizations marketing or using local produce, including the boards of local farmers markets, school districts, other large institutions, such as hospitals, correctional facilities, or existing food cooperatives.

These additional lands may include designated critical areas, such as bogs used to grow cranberries or farmed wetlands. Where these lands are also designated critical areas, counties and cities planning under the act must weigh the compatibility of adjacent land uses and development with the continuing need to protect the functions and values of critical areas and ecosystems.

[Statutory Authority: RCW 36.70A.050 and 36.70A.190. 10-03-085, § 365-190-050, filed 1/19/10, effective 2/19/10. Statutory Authority: RCW 36.70A.050. 91-07-041, § 365-190-050, filed 3/15/91, effective 4/15/91.]

# APPENDIX "G"

WAC 365-190-500
Internal Consistency

**WAC 365-196-500 Internal consistency.** (1) Comprehensive plans must be internally consistent. This requirement means that differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other.

(2) Use of compatible assumptions. A county or city must use compatible assumptions in different aspects of the plan.

(a) A county or city should use common numeric assumptions to the fullest extent possible, particularly in the long-term growth assumptions used in developing the land use, capital facilities and other elements of the comprehensive plan.

(b) If a county or city relies on forecasts, inventories, or functional plans developed by other entities, these plans might have been developed using different time horizons or different boundaries. If these differences create inconsistent assumptions, a county or city should include an analysis in its comprehensive plan of the differences and reconcile them to create a plan that uses compatible assumptions.

(3) The development regulations must be internally consistent and be consistent with and implement the comprehensive plan.

(4) Consistency review. Each comprehensive plan should provide mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflicts become apparent. At a minimum, any amendment to the comprehensive plan or development regulations must be reviewed for consistency. The review and update processes required in RCW 36.70A.130 (1) and (3) should include a review of the comprehensive plan and development regulations for consistency.

(5) See WAC 365-196-800 for more information on the relationship between development regulations and the comprehensive plan. See WAC 356-196-305 for more information on the relationship between county-wide planning policies and the comprehensive plan. See WAC 365-196-315 (5)(a) for information on consistencies between assumptions and observed development for cities or counties subject to monitoring requirements in RCW 36.70A.215.

[Statutory Authority: RCW 36.70A.050 and 36.70A.190. 10-03-085, § 365-196-500, filed 1/19/10, effective 2/19/10.]

# APPENDIX "H"

DCC 18.010-040
"R-O Overlay District"
demonstrate that there is no such thing as a
Douglas County
"Recreational Overlay Permit"

# Chapter 18.46
# R-O RECREATIONAL OVERLAY DISTRICT

**Sections:**



## 18.46.010 Purpose and intent.

The purpose of the R-O recreational overlay district is to provide for the continuance of public and private parks and other outdoor recreational facilities in order to encourage the development of additional active recreational facilities in Douglas County, and to maintain adequate buffers between recreational developments and surrounding land uses.
(Ord. TLS 97-10-71B Exh. F (part))

## 18.46.020 Where permitted.

The R-O district is permitted within all districts enumerated within this title, except where specifically prohibited within the code.
(Ord. TLS 97-10-71B Exh. F (part))

## 18.46.030 Public review and application procedures.

The request for authorization and development of an R-O district shall be processed in the following manner:
A. Applications for the establishment, expansion or amendment of an R-O district shall be processed in accordance with the provisions for quasi-judicial review in DCC Section 14.10.040. Approval of an application shall be based on a specific site design authorizing only the specific development proposed, unless amended.
B. Subsequent project phases, development actions and/or permits such as divisions of land, building permits, or shoreline substantial development permits, shall be processed in accordance to the application classification of DCC Chapter
14.10, the approved R-O district and applicable development regulations

of the DCC existing at the time of application.
(Ord. TLS 00-01-04B Exh. B (part); Ord.TLS 97-10-71B Exh. F (part)

**18.46.040 Permitted uses.**
Uses permitted in the R-O district are public and private outdoor recreational land
uses, such as:
A. Water-dependent facilities, including but not limited to boat launches, fishing
access points, marinas, public docks and parks;
B. Public and private parks outside of an urban growth area;
C. Golf courses;
D. Ball fields and courts;
E. Shooting ranges;
F. Recreational vehicle parks and campgrounds, subject to the criteria enumerated in DCC Section 18.80.230;
G. Outdoor commercial facilities and activities charging an admission fee for
participants or spectators, such as motorized vehicle race tracks or horse racing;
H. Outdoor music festivals;
I. Outdoor events or festivals for group camps, sports rallies, and club organizations;
J. Recreational trail systems; and
K. Other similar uses. (Ord. TLS 97-10-71B Exh. F (part))